

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



July 13, 2004

TO: ALL PARTIES OF RECORD IN RULEMAKING 01-09-001

Decision 04-07-036 is being mailed without the concurrence of Commissioner Loretta M. Lynch. The Concurrence will be mailed separately.

Very truly yours,

/s/ ANGELA K. MINKIN
ANGELA K. MINKIN
Chief Administrative Law Judge

ANG:cdl

Decision 04-07-036

July 8, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.

Rulemaking 01-09-001
(Filed September 6, 2001)

Order Instituting Investigation on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.

Investigation 01-09-002
(Filed September 6, 2001)

**ORDER GRANTING LIMITED REHEARING OF DECISION 03-10-088,
MODIFYING DECISION AND DENYING REHEARING OF DECISION,
AS MODIFIED**

The California Public Utilities Commission ("Commission") grants the rehearing application of the Office Of Ratepayer Advocates ("ORA") and The Utility Reform Network ("TURN") regarding the four new items of evidence submitted into the record after the close of evidentiary hearings. Rehearing is also granted regarding TURN's time trend regression analysis, and TURN shall be allowed to move this evidence into the record on rehearing. In addition, rehearing is granted regarding Pacific Bell Telephone Company's P.A. 02-03 customer surveys and the results thereof.¹ With regard to all other issues raised in the application for rehearing filed by ORA and TURN,

¹ The former Pacific Bell Telephone Company is now SBC CA. However, since D.03-10-088 referred to "Pacific," this decision will as well.

we modify the decision to clarify our intent and deny rehearing of those other issues as discussed herein.

I. BACKGROUND

On September 6, 2001, the Commission issued Order Instituting Rulemaking 01-09-001 and Order Instituting Investigation 01-09-002 (collectively, the “Order”). The purpose of the proceeding established by the Order was to assess and possibly revise elements of the New Regulatory Framework (“NRF”) for Pacific and Verizon California Incorporated (“Verizon”). The Order divided the proceeding into three phases: Phase 1 addressed factual issues related to the audit of Verizon conducted by the Office of Ratepayer Advocates (“ORA”); Phase 2 addressed both factual issues related to the audit of Pacific that was being conducted by the Telecommunications Division (referred to as “Phase 2A”) and the quality of service that was provided by Pacific and Verizon (referred to as “Phase 2B”). In Phase 3, we will determine whether and how NRF should be revised based, in part, on the record developed in Phase 2.

The Order preliminarily determined that (1) the category of this proceeding is “ratesetting” and (2) there is a need for evidentiary hearings. This determination was affirmed by the Assigned Commissioner’s Ruling on December 27, 2001, which states that “[t]here is a need for evidentiary hearings in Phases 1 and 2.”²

On March 12, 2003, the Administrative Law Judge (ALJ) issued a proposed decision regarding the Phase 2B service quality issues.³ On June 11, 2003, the Assigned Commissioner issued a proposed alternate decision regarding the Phase 2B service quality issues. The proposed alternate decision found that “Verizon offers very good service quality Pacific offers generally good service quality in most areas, but there are several important areas of weakness in the quality of specific residential services.”⁴

² Assigned Commissioner’s Ruling Determining The Category, Scope, Schedule, Need For Hearing, And The Principal Hearing Officer For The Proceeding, dated Dec. 27, 2001, p. 16.

³ Proposed Decision of ALJ (mailed March 12, 2003), p. 4.

⁴ Alternate Proposed Decision of Commissioners Kennedy and Peevey (mailed 6/11/03), p. 2.

The proposed alternate decision included results of statistical analyses performed by Commission staff on data that was not introduced into the evidentiary record during the hearing.

ORA, in opening comments filed on July 2, 2003, objected to the proposed alternate decision asserting, among other things, that (1) the proposed alternate decision ignores ratepayer input in favor of industry statistics that the decision acknowledges are flawed; (2) the record does not support the proposed alternate decision's reliance on data provided by SBC and Verizon; and (3) the proposed alternate decision reaches conclusions that are not supported by the record.⁵

Similarly, in comments filed on July 2, 2003, TURN objected to the proposed alternate decision asserting, among other things, that the decision's statistical analyses and comparisons with other utilities are fundamentally flawed and should be rejected.⁶

On July 7, 2003, Pacific filed reply comments on the proposed alternate decision. Pacific rebutted ORA and TURN's comments by stating that ORA's contention that the proposed alternate decision was not supported by the record is false, that the proposed alternate decision reaches sound conclusions about how service quality has fared under NRF, and that TURN's premise about service quality deterioration under NRF is not supported by the record.

Verizon also filed reply comments on July 7, 2003, stating that ORA and TURN's criticism of the proposed alternate decision's ARMIS analysis have no foundation in the record, are wrong, and must be rejected. Verizon also asserts that ORA's and TURN's other comments have no merit.

On July 17, 2003, the Assigned Commissioner's advisor sent an e-mail to all parties noting that the all-party meeting of Wednesday July 16, 2003, made clear that

⁵ Opening Comments Of The Office Of Ratepayer Advocates On The Proposed Alternate Decision Of Commissioners Kennedy And Peevey, filed July 2, 2003, pp. 2-10.

⁶ Comments Of The Utility Reform Network On The Alternative Proposed Decision of Commissioners Kennedy and Peevey On Service Quality Issues, filed July 2, 2003, p. 8.

some parties to the proceeding were having difficulty understanding the alternate proposed decision. The e-mail notified parties that the Assigned Commissioner was considering accepting four new items of evidence into the record for the purpose of making the proposed alternate decision's calculations easier to follow and/or verify. The four new items of evidence are: (1) Work papers associated with the production of the alternate proposed decision; (2) Charts and tables of Pacific concerning compliance with GO 133-B standards; (3) Charts and tables of Verizon concerning compliance with GO 133-B standards; and (4) Copies of the work papers used by Pacific's expert, Dr. Hauser.

The e-mail notified parties that comments were due on the Assigned Commissioner's proposal by July 24, 2003, and replies, if any, by July 31, 2003. Parties were also allowed to suggest other items for inclusion into the record, as well as the reasons for their proposals. Lastly, the e-mail notified parties that if the Assigned Commissioner decided to set aside submission and accept these four new items of evidence into the record, the reasons for doing so would be incorporated into the revised alternate proposed decision.

On July 24, 2003, ORA filed comments on the Assigned Commissioner's proposal to set aside submission. ORA objected, stating that admitting the evidence without holding evidentiary hearings would be prejudicial and deprive ORA of its right to due process, and that "the question of whether the data can adequately support the conclusions reached in the Alternate is an issue that must [be] addressed via cross examination."⁷

TURN also filed comments on July 24, 2003. It complained that the statistical analyses underlying the proposed alternate decision were both misplaced and inadequate.⁸ TURN requested that, in the event that the Assigned Commissioner did

⁷ Comments Of The Office Of Ratepayer Advocates On Assigned Commissioner's Proposal To Set Aside Submission To Accept Additional Items Into The Record, filed July 24, 2003, pp. 5, 8.

⁸ Comments Of The Utility Reform Network on Whether To Set Aside Submission For Acceptance Into The Record Of Additional Items, filed July 24, 2003, p. 1.

accept the four new items of evidence into the record, the results of TURN's own statistical analyses also be entered into the record.

On July 31, 2003, Pacific filed reply comments on the proposal to set aside submission stating that while it did not object to Commissioner Kennedy's efforts to supplement the record, the issue is the extent to which supplementation is appropriate. Pacific objected to the further admission of TURN's time trend regression analysis because it does not include performance during the most recent three years (1999-2001). Pacific also asserted that the admission of charts and tables showing G.O. 133-B results is proper, and that the admission of ARMIS data is proper.

Verizon also filed reply comments on the proposal to set aside submission stating, among other things, that the current record, without the proposed additions, convincingly supports the proposed alternate decision's conclusions regarding Verizon's service quality during the NRF period. Verizon, however, did not object to the proposal to set aside submission and accept additional items of evidence into the record. Moreover, Verizon asserted that there are no legitimate arguments against accepting the evidence and that TURN and ORA's objections should be rejected.

On October 30, 2003, the Commission voted to adopt the Assigned Commissioner's proposed alternate decision as D.03-10-088, the Interim Opinion Regarding Phase 2B Issues Service Quality Of Pacific Bell And Verizon California, Inc. The final decision included acceptance of the four new items of evidence into the record.⁹ (D.03-10-088, p. 190) The Commission did not reopen hearings per ORA's request nor did it accept TURN's statistical analyses into the record.

⁹ (1) Work papers associated with the production of the alternate proposed decision, which were distributed to all parties in this proceeding on July 8, 2003.

(2) Charts and tables of Verizon concerning compliance with GO 133-B standards, which were distributed to all parties in this proceeding on July 15, 2003, and amended on July 16, 2003 by Verizon.

(3) Charts and tables of SBC concerning compliance with GO 133-B standards, which were distributed to all parties in this proceeding on July 14, 2003 by SBC.

(4) Copies of the work papers of Pacific's expert witness Dr. Hauser supporting the "Armris Attachments" to his opening and reply testimony, which were provided to ORA in response to data

On December 8, 2003, ORA and TURN jointly filed an application for rehearing of D.03-10-088. In their rehearing application, ORA and TURN challenge D.03-10-088 on the following grounds: (1) D.03-10-088 is based on its own extra-record analysis and thereby deprives parties of due process, including the right to cross-examination; (2) D.03-10-088 admits evidence after the close of the proceeding in violation of parties' due process rights; and (3) D.03-10-088 is arbitrary and capricious in that, among other things, it reaches conclusions based on claims that are contrary to the record facts, creates new standards for service quality performance, and selectively and arbitrarily excludes evidence submitted by ORA and TURN that impeaches evidence admitted after the proceeding was submitted. (Rhg. App., pp. 1-2)

On December 23, 2003, SBC filed a response to the application for rehearing asserting, among other things, that the conclusions reached in the decision are not arbitrary or capricious, and that the Commission did not violate due process.

Verizon also filed a response to the application for rehearing on December 23, 2003, asserting, among other things, that the challenged analysis is based completely on record evidence and reasonable inferences based on that record, the limited information added to the record after submission is unobjectionable, the decision is not arbitrary and capricious, and the record as a whole supports the decision's conclusions.

II. DISCUSSION

As noted above, this proceeding was categorized as "ratesetting" requiring evidentiary hearings in Phases 1 and 2.¹⁰ As a result, there was an evidentiary hearing in Phase 2B during which sponsoring witnesses on behalf of parties offered various items of evidence into the record. Prior to admission of evidence into the record, all parties had the opportunity to examine a proposed item of evidence and to cross-examine the sponsoring witness.

request Pacific 031-02.

¹⁰ Assigned Commissioner's Ruling Determining The Category, Scope, Schedule, Need For Hearing, And The Principal Hearing Officer For The Proceeding, dated Dec. 27, 2001, p. 16.

In D.03-10-088, we accepted the above-mentioned four new items of evidence into the record without holding evidentiary hearings. D.03-10-088 states that “admitting this evidence will enable the parties to better understand both the statistical methodology and the analysis that was used by the Commission throughout the decision.” (D.03-10-088, p. 192.) However, we rejected ORA’s request for evidentiary hearings regarding these four new items of evidence. We also rejected TURN’s request to submit a time trend regression analysis into the evidentiary record.

The application for rehearing has given us the opportunity to reconsider our decision to admit certain evidence into the record without providing evidentiary hearings. We have carefully reviewed all the arguments raised in the application for rehearing, and in the responses filed by Pacific and Verizon. After reconsideration, we agree with applicants that evidentiary hearings are appropriate in this case for the four new items of evidence, and that TURN should be allowed to offer its time trend regression analysis into the record. We also agree with applicants that Pacific should be ordered to produce its PA 02-03 customer surveys and results for the relevant time period under NRF.

Therefore, we grant rehearing regarding the following four new items of evidence that were submitted into the record after the close of evidentiary hearings: (1) the Commission’s work papers; (2) the GO 133-B data for Pacific; (3) the GO 133-B data for Verizon; and (4) Pacific’s expert witness Dr. Hauser’s work papers. We also grant rehearing regarding TURN’s time trend regression analyses, which TURN may offer as evidence into the record, subject to cross-examination by the parties.

In addition, we grant rehearing regarding ORA and TURN’s assertion that the decision arbitrarily excuses SBC’s failure to file P.A. 02-03 customer surveys. In D.03-10-088, we erred in stating, “From our review of the record, it appears that the simple question was never asked or answered.” (D.03-10-088, p. 137.) A clear inference can be drawn from the record that Overland did ask for these surveys and Pacific refused to supply them. Accordingly, we will modify D.03-10-088 to delete the foregoing sentence from page 137. Although Pacific was confused by the requirements for the P.A. 02-03 customer surveys we do not find that Pacific’s confusion nor the Commission or

staff's failure to raise the requirement over the past 11 years is a good reason for Pacific's current lack of compliance with the NRF requirement. We clarify that the P.A. 02-03 customer surveys refer not only to Commission-initiated customer surveys, but to Pacific's own surveys as well.

Rehearing will give parties the opportunity to further examine the evidence, and to allow cross-examination on that evidence. We deny rehearing on all other issues raised by ORA and TURN.

Specifically, we deny rehearing regarding ORA and TURN's assertion that the Commission violated Rule 84 of the Commission's Rules Of Practice And Procedure. ORA and TURN assert that Rule 84 is the exclusive means by which submission may be set aside and a proceeding reopened, and that the availability of this procedure is limited to parties. While it is correct that Rule 84 is limited to parties, it does not prohibit an assigned Commissioner from reopening a proceeding for the taking of additional evidence. The Commission, pursuant to its constitutional and statutory authority, may do so. Section 1700 of the Public Utilities Code provides that no informality shall invalidate any order, decision, or rule made by the Commission, while Section 1701.1(b) empowers the Assigned Commissioner to control the scope of the proceeding. Therefore, we find that an Assigned Commissioner may reopen a proceeding and such reopening is not subject to Rule 84. Further, we deny rehearing of ORA and TURN's assertion that the Commission, by reopening the proceeding for the acceptance of additional evidence, violated Rules 45 and 46 since this assertion is dependent on the Commission being subject to Rule 84, which it is not.

Moreover, we deny rehearing regarding ORA and TURN's assertion that the Commission violated Rule 69(b) by admitting documents into evidence that were not certified under penalty of perjury. As mentioned above, Section 1700 provides that no informality in any hearing, investigation, or proceeding shall invalidate any order, decision, or rule made by the Commission. Moreover, since we are granting rehearing regarding the four new items of evidence we accepted into the record, parties will have the opportunity to question the authenticity of that evidence.

We deny rehearing regarding ORA and TURN's assertion that the opportunity for comments and replies on the Commission's decision to set aside submission was improperly limited to the procedural question of whether setting aside submission was permissible. A review of the comments and replies filed by ORA and TURN indicates that neither ORA nor TURN in fact limited its response to the procedural question. Hence, this objection is moot.

We deny rehearing regarding the contention that D.03-10-088 arbitrarily and selectively weighs parties' survey results in favor of Pacific. ORA asserted that D.03-10-088 applies a different and stricter standard to ORA's evidence than to evidence proffered by Pacific. (Rhg. App., p. 24.) We disagree. We rejected ORA's survey results given the steep decline in the response rate between surveys. Although we found flaws in the evidence submitted by both ORA and TURN, we found that we could use Pacific's surveys to make statistical findings. ORA's survey results, on the other hand, lacked a reliable statistical basis due to the sharp drop in the response rate in the 2001 survey from that of 1995. As the trier of fact, the Commission is charged with the responsibility of determining how much weight to give the evidence before us. In this case, we properly exercised our discretion in determining how much weight to give the respective surveys submitted by ORA and TURN. ORA and TURN have not established the need for rehearing with respect to the weight given to the survey results.

Finally, we deny rehearing regarding ORA and TURN's assertion that Verizon provided erroneous data to the Commission in its Installation Reports data. In D.03-10-088, we found "ORA's challenges to Verizon's data almost identical to their challenges to Pacific's and suffer from the same deficiencies. We reject ORA's challenges to Verizon's data for essentially the same reasons." (D.03-10-088, p. 59.) On rehearing, ORA asserts that its claims about Verizon's data are not identical to those raised by Pacific's data. ORA contends that our rejection of its challenges to Pacific's data is therefore arbitrary and capricious. (Rhg. App., pp. 26-27.)

On rehearing, we acknowledge that ORA is correct that its reasons for challenging Verizon's data were not the same as those it used to challenge Pacific's data.

We will therefore modify D.03-10-088 to delete the erroneous statement on page 59. However, we nonetheless continue to disagree with ORA's claim that Verizon's data submitted to the Commission failed to comply with D.00-03-021.

D.00-03-021 states:

“3. Installation Reports

Applicants shall provide a list of installations for all residential Service, and a separate list for all single-line business service. These lists shall include at least the following information: the month and year of the report; the account number, the wire center code associated with the account; the date of the order; the date of commitment; the date installation was completed; and whether it was referred to cable maintenance because of a no-facilities condition.

This language does not specifically prohibit Verizon from including orders for inter-exchange service. Because there is no specific prohibition against inclusion of inter-exchange service data, we cannot accept rehearing applicants' argument that Verizon's data is flawed because it includes such data. Based on the record before us, we cannot find that Verizon's data does not comply with D.00-03-021. Therefore, rehearing applicants have failed to establish legal error regarding our rejection of ORA's challenges to Verizon's data. Rehearing on this aspect of D.03-10-088, as modified herein, is denied.

Therefore **IT IS ORDERED** that:

1. On page 59, delete the third full paragraph that reads, “We find that ORA's challenges to Verizon's data almost identical to their challenges to Pacific's and suffer from the same deficiencies. We reject ORA's challenges to Verizon's data for essentially the same reasons.”

2. On page 137, in the first full paragraph, delete the sentence that reads, “From our review of the record, it appears that this simple question was never asked or answered.”

3. ORA and TURN's application for rehearing of D.03-10-088 is granted in part with respect to the following four new items of evidence: (1) the Commission's workpapers; (2) GO 133-B data for Pacific; (3) GO 133-B data for Verizon; and (4) Pacific's expert Dr. Hauser's workpapers.

4. The Commission shall reopen evidentiary hearings in this proceeding to give parties the opportunity to cross-examine sponsoring witnesses regarding the above-mentioned four new items of evidence.

5. All parties shall be given the opportunity to cross-examine a sponsoring witness on behalf of the Commission about the Commission's work papers associated with the production of the alternate proposed decision, distributed to all parties on July 8, 2003, including cross examination regarding the statistical analyses contained therein.

6. All parties shall be given the opportunity to cross-examine a sponsoring witness on behalf of Verizon about the charts and tables of Verizon concerning compliance with GO 133-B standards, which were distributed to all parties in this proceeding on July 15, 2003, and amended on July 16, 2003 by Verizon.

7. All parties also shall be given the opportunity to cross-examine a sponsoring witness on behalf of the Commission as to how the Commission used the above-referenced charts and tables of Verizon concerning compliance with GO 133-B standards, and any statistical analyses performed by Commission staff on such data and the results thereof.

8. All parties shall be given the opportunity to cross-examine a sponsoring witness on behalf of Pacific about the charts and tables of Pacific concerning compliance with GO 133-B standards, which were distributed to all parties in this proceeding on July 14, 2003 by SBC.

9. All parties also shall be given the opportunity to cross-examine a sponsoring witness on behalf of the Commission as to how the Commission used the above-referenced charts and tables of Pacific concerning compliance with GO 133-B

standards, and any statistical analyses performed by Commission staff on such data and the results thereof.

10. All parties shall be given the opportunity to cross-examine Pacific's expert witness Dr. Hauser about his work papers supporting the "Armis Attachments" to his opening and reply testimony, which were provided to ORA in response to data request Pacific 031-02.

11. All parties also shall be given the opportunity to cross-examine a sponsoring witness on behalf of the Commission as to how the Commission used Dr. Hauser's work papers, any statistical analyses performed by Commission staff on the data contained in Dr. Hauser's work papers and the results thereof.

12. The above-referenced four new items of evidence in Ordering Paragraphs 3-11 have been previously distributed to parties. However, upon request, the assigned Administrative Law Judge shall distribute copies to parties.

13. The Commission shall allow TURN to submit its time trend regression analyses into evidence, and shall give parties the opportunity to cross-examine TURN about this new evidence and the content thereof.

14. The Commission hereby orders Pacific to produce its P.A. 02-03 customer surveys and the results thereof for the relevant time period reviewed under NRF. All parties shall be given the opportunity to cross-examine a sponsoring witness on behalf of Pacific about these items.

15. The scope of cross-examination of this rehearing will be limited to the four new items of evidence, TURN's time trend regression analysis, and Pacific's P.A. 02-03 customer surveys and the results thereof.

16. Rehearing is denied as to all other issues raised by ORA and TURN for the reasons specified above.

This order is effective today.

Dated July 8, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I will file a concurrence.

/s/ LORETTA M. LYNCH
Commissioner